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No. 96-1463

In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
PETITIONER

v.

STEPHEN M. PADILLA AND EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that sufficient evidence supported the jury's finding that petitioner violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, by retaliating against respondent for participating in an investigation by the Equal Employment Opportunity Commission.

2. Whether the court of appeals correctly concluded that sufficient evidence supported the jury's finding that petitioner's violation of the ADEA was willful.

3. Whether, in the circumstances of this case, the court of appeals correctly upheld an award of front pay until respondent reaches retirement age.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 92 F.3d 117. The opinions of the district court (Pet. App. 27a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1996. The petition for rehearing was denied on December 13, 1996. Pet. App. 45a-46a. The petition for a writ of certiorari was filed on March 13, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1983, respondent Stephen Padilla began working for petitioner Metro-North Commuter Railroad Company. In April 1985, petitioner promoted respondent to the position of superintendent of train operations, responsible for petitioner's operations control center (OCC). Respondent reported to Edmond Boni, the general superintendent of transportation, who in turn reported to Donald Nelson, petitioner's vice president of operations. Pet. App. 3a.

One of respondent's principal responsibilities was ensuring the timely operation of petitioner's trains. Respondent's August 1987 performance evaluation, which Boni prepared, and Nelson approved, stated that the "[o]n-time performance" of petitioner's trains was "above goal in all categories." Pet. App. 4a. The evaluation described respondent as an "[e]xcellent leader and a natural organizer" who is "[v]ery cost conscious" and has "done an outstanding job of managing dispatchers and towers while reducing costs." *Ibid.*

In July 1987, respondent demoted Michael Barletta, a 61-year-old assistant chief train dispatcher. Although respondent believed that Barletta's performance was "excellent," Boni had stated to respondent that Barletta was "too old for the job" and instructed respondent to demote Barletta. In October 1987, respondent accompanied Nelson on a business trip to London. During the trip, Nelson asked respondent "what was going on with this Boni-Barletta business." Pet. App. 4a. Respondent answered by criticizing Boni's role in the demotion, stating that Boni had disparaged Barletta as "too old and too slow," and that Boni had "wrongly disqualified Barletta." *Ibid.*

In January 1988, Barletta filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging age discrimination. As part of EEOC's investigation of Barletta's charge, respondent was scheduled to meet with EEOC investigators on April 6, 1988. On that date, respondent advised Nelson that he was scheduled to meet with the EEOC concerning Barletta's complaint. Because a serious train accident occurred on that same day, however, Nelson instructed respondent to reschedule the interview. Pet. App. 4a-5a.

On April 7, 1988, respondent met with an EEOC investigator. An attorney employed by petitioner also attended the interview. At the conclusion of the meeting, respondent signed an affidavit stating that Barletta had "performed his job satisfact[orily]," but that "Boni had insisted that Barletta be removed from his job." Pet. App. 5a. Respondent's affidavit stated further that Boni had made several disparaging remarks concerning Barletta's age. *Ibid.*

Shortly after respondent's April 7, 1988 interview with the EEOC investigator, Boni angrily approached respondent and accused him of being "disloyal," and said he was "all done." Pet. App. 5a. Later that month, Boni again threatened respondent that he was "all done," and that Boni was "going to get [respondent] for cooperating and being disloyal." *Ibid.* Boni also stated that "if you don't stop cooperating with them guys downtown, I'll take care of you. . . . I don't even have to do it myself, [I'll] get [Marijanke] Badurina [or another employee] to do it." *Id.* at 5a-6a.

Badurina was a financial analyst whom Boni had hired in February 1987 to review the budget of petitioner's transportation department, which at that time had four units: OCC, manpower control, tower

operations, and field operations. Pet. App. 6a. When Badurina encountered problems during her administrative review, she approached employees in the affected unit to attempt to resolve the problems. *Id.* at 6a, 13a. That was not the practice, however, with respect to respondent's unit. *Id.* at 13a.

During Badurina's review of OCC's payroll records in April 1988, Badurina discovered that one of respondent's deputies had approved and signed time sheets that indicated that some OCC employees had improperly used sick days to extend their two-day rest periods. Without first discussing the problem with anyone at OCC, Badurina alerted Boni about the problem. On May 3, 1988, Boni and Badurina discussed the problem with Nelson. Pet. App. 6a. On May 4, 1988, Nelson met with respondent to discuss the problems detected by Badurina. Because respondent had never been advised of the problem before this meeting and had not routinely reviewed time sheets as part of his job, respondent was unable to answer many of Nelson's questions. *Id.* at 6a-7a. At the end of the meeting, Nelson suspended respondent pending the outcome of an investigation of OCC's administrative practices by David Dieck, who was petitioner's director of budget and performance analysis. *Id.* at 7a.

On May 9, 1988, respondent filed a charge with the EEOC alleging that petitioner suspended him in retaliation for his participation in the EEOC's investigation of Barletta's charge. On May 10, 1988, Nelson was advised of respondent's charge. On May 13, 1988, Nelson received a summary of Dieck's findings that concluded that OCC employees had improperly coupled sick days with rest days. On June 10, 1988, Nelson demoted respondent. Respondent exercised his union bumping rights and returned to

his former position as a train dispatcher. Pet. App. 7a. As a result, his salary declined from $65,800 to about $45,000. *Id.* at 8a.

2. On December 7, 1988, respondent filed a complaint in district court alleging that petitioner violated Section 4(d) of the ADEA, 29 U.S.C. 623(d), by demoting him in retaliation for his participation in Barletta's EEOC proceeding.[1] The EEOC subsequently filed a complaint also alleging that petitioner violated the ADEA by demoting respondent. In March 1990, the court consolidated the actions for trial. Pet. App. 8a.

At trial, Nelson testified he demoted respondent not because of respondent's participation in Barletta's EEOC proceedings, but because of "mismanagement" at the OCC and because respondent had become "withdrawn" and had "show[n] less interest in the job." Pet. App. 7a. On June 30, 1994, the jury returned a verdict finding that petitioner willfully retaliated against respondent because of his participation in the EEOC's investigation of Barletta's charge. *Id.* at 8a.

On January 3, 1995, the district court entered an order denying petitioner's motion for judgment as a matter of law and denying respondent's request for reinstatement but awarding front pay. Pet. App. 27a-35a. The court concluded that "the jury could have found, on the evidence, that Nelson was aware of [respondent's] protected activity," including respondent's statement to the EEOC concerning Barletta and respondent's own retaliation charge. *Id.* at 28a.

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[1] Section 623(d) of Title 29 prohibits an employer from discriminating against an employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."

The court also concluded that "the jury could have found, on all of the evidence, that there was a causal connection between [respondent's] protected activity and his demotion." *Id.* at 29a (footnote omitted). The court reviewed the evidence and explained that it supported the conclusion that, on May 10 or 11, 1988, Nelson decided to demote respondent shortly after learning of his retaliation charge and before Nelson received Dieck's report of OCC's administration. *Ibid.* That same evidence, the court continued, supported the jury's disbelief of petitioner's articulated reasons for demoting respondent. *Id.* at 30a-31a. The court also determined that the evidence was sufficient to support the jury's finding that petitioner's violation of the ADEA was willful, because Nelson testified at trial that he was "aware that it's a violation of law to take action against an employee who engages in activity protected by that law" and that he knew "giving a statement to the [EEOC] is a protected activity under the law." *Id.* at 31a.

Turning to the question of relief, the court denied respondent's request for reinstatement because it believed that "reinstatement would, in the present case, be unworkable." Pet. App. 33a. The court also observed that "[t]here is no convincing evidence that [respondent], now in his forties * * * would be able to find work commensurate with his skills at a salary equal to what he received as Superintendent of Train Operations." *Id.* at 34a n.4. Accordingly, the court ordered petitioner to pay respondent "a salary equal to that paid to him as Superintendent of Train Operations * * * until such time during his sixty-seventh year * * * as he is entitled to receive a full pension." *Id.* at 34a. On September 12, 1995, the district court entered an amended judgment awarding

back pay of $108,720 plus interest, front pay equal to the difference between respondent's salary as a train dispatcher and his previous salary, and liquidated damages in the amount of $108,720 plus interest. *Id.* at 21a-23a.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court rejected petitioner's contention that there was insufficient evidence to support the jury's finding that respondent was demoted in retaliation for his participation in EEOC proceedings. *Id.* at 12a. The court summarized the evidence demonstrating that respondent's suspension and demotion occurred within a month of Nelson's learning about respondent's protected activities. *Ibid.* The court also found that there was ample evidence entitling the jury to disbelieve Nelson's articulated reasons for demoting respondent. The court explained that petitioner "failed to show that [respondent] had become withdrawn and that he had demonstrated a lack of interest in his work." *Id.* at 12a-13a. Moreover, although petitioner attributed the demotion to the management problems Badurina had uncovered, there was evidence that respondent was treated more harshly than managers who were guilty of more serious mismanagement. For instance, payroll problems in respondent's unit cost petitioner some tens of thousands of dollars, whereas payroll problems detected in the manpower control unit, where no managers were demoted, cost petitioner millions of dollars. *Id.* at 6a, 13a. The court also noted that Nelson "acknowledged that he knew of [respondent's] retaliation charge prior to demoting him," and based on respondent's "testimony of his conversations with Nelson in October of 1987 and on April 6, 1988, the jury could have found that Nelson knew of the content of [re-

spondent's] statement to the EEOC prior to suspending him." *Id.* at 13a. Accordingly, the court concluded that "there was sufficient evidence to support the jury's conclusion that [respondent's] demotion was for purposes of retaliation." *Ibid.*

The court of appeals also found sufficient evidence supporting the jury's finding of willfulness. Pet. App. 14a. The court observed that Section 626(b) provides for the recovery of liquidated damages for "willful" violations of the ADEA, which occur when "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 13a-14a. The court concluded that "because Nelson knew that it was illegal for him to demote [respondent] in retaliation for [his] participation in EEOC proceedings, the jury was entitled to find that Nelson's retaliatory conduct was willful." *Id.* at 14. The court also rejected petitioner's argument that it established good faith under *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), because Nelson, on advice of counsel, waited to demote respondent until after the EEOC had conducted its investigation of his charge. The court reasoned that, unlike in *Thurston*, where "company officials had sought legal advice and had consulted with union officials before implementing a new employee transfer plan," Nelson "did not testify that * * * lawyers told him that [respondent] legally could be demoted, nor did he indicate that he in good faith relied on any such advice in taking action against [respondent]." Pet. App. 14a-15a.

The court of appeals also upheld the district court's award of front pay. Pet. App. 15a-20a. The court rejected petitioner's contention that respondent "failed to undertake reasonable efforts to mitigate his

damages." *Id.* at 17a. The court reasoned that respondent testified that his former position as superintendent of train operations is "so specialized as to be virtually unique" and "[t]here are no comparable positions in other industries." *Ibid.* In contrast, petitioner "failed to provide any evidence that suitable work existed for [respondent], who had only a high-school education and had worked solely for the railroads since the age of 22." *Id.* at 18a. Thus, the court concluded that "[i]n view of the absence of evidence that suitable work existed for him and in view of his unique and narrow work qualifications, [respondent's] failure to attempt to find a position comparable to that of superintendent of train operations did not constitute a failure to mitigate his damages." *Ibid.* Moreover, the court found that "given the lack of evidence of other opportunities available to [respondent], his decision to assume the position of train dispatcher * * * after his demotion was reasonable mitigation." *Ibid.*

The court also rejected petitioner's challenge to the duration of the district court's front pay award. Pet. App. 18a. The court reasoned that because respondent had "no reasonable prospect of obtaining comparable alternative employment," the award of front pay reflecting the difference between respondent's pre- and post-demotion salary was "necessary to make [respondent] whole after his demotion." *Id.* at 19a-20a. The court explained that respondent's limited education and work experience, which "has been confined primarily to serving as a dispatcher and a supervisor to dispatchers in the railroad industry," made it "very unlikely that he will be able to find alternative employment" at the salary he received as superintendent of train operations. *Ibid.* Thus,

the court concluded that although "the award of front pay in this case is for a lengthy period of time," "[i]n view of the unique circumstances of this case," the award constituted a "proper[ ] exercise[ ]" of the district court's discretion. *Id.* at 20a.[2]

ARGUMENT

The decision of the court of appeals correctly applies established legal principles to the unusual facts of this case and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 13-17) that the court of appeals' decision establishes "a new *per se* negligence standard" of liability under the ADEA inconsistent with this Court's decisions in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993), and *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).[3] Based on its review of the facts in this case, however, the court of appeals simply held that respondent met its burden of proving that his demotion was a result of retaliation. That factbound holding does not warrant this court's review.

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[2] The court also rejected petitioner's contention that the front pay award was inconsistent with *McKennon* v. *Nashville Banner Publishing Company*, 513 U.S. 352 (1995), because even if petitioner had not demoted respondent in June 1988 for retaliatory reasons, it would have demoted him for a legitimate reason after the trial. Pet. App. 15a-17a. Petitioner does not raise that issue before this Court.

[3] This Court has assumed without deciding that the burden-shifting rules in Title VII cases apply to cases under the ADEA. *O'Connor* v. *Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996).

In any event, the court of appeals' decision is correct. This Court in *Hicks* reiterated the principle that a plaintiff alleging discrimination "at all times bears the ultimate burden of persuasion." 509 U.S. at 511. The decision below properly applied that standard and concluded that the evidence was sufficient to support the jury's verdict that petitioner violated the ADEA. In July 1987, Boni directed respondent to demote Barletta. In August 1987, respondent received favorable performance evaluations. In October 1987, respondent advised Nelson that Boni mistreated Barletta because of his age. On April 6, 1988, respondent advised Nelson that he would be giving a statement to the EEOC concerning Barletta's complaint. On May 4, 1988, Nelson suspended respondent.[4] On May 10, 1988, Nelson learned that

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[4] Petitioner argues that the court "relied only on [respondent's] vague and self-serving comments" to support the conclusion that the evidence supported the finding that, at the time of respondent's suspension, Nelson had knowledge of respondent's EEOC affidavit and its content, "despite Nelson's repeated denials" of such knowledge. Pet. 18, 19. This Court, however, "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, the record contains ample evidence to support the court of appeals' conclusion that "the jury could have found that Nelson knew of the content of [respondent's] statement to the EEOC prior to suspending him." Pet. App. 13a. Respondent testified that Nelson asked him in October 1987 about the problem between Boni and Barletta, and that respondent informed Nelson that Boni had criticized Barletta because of his age and had "wrongly disqualifed" Barletta. *Id.* at 4a, 12a. Respondent also testified that he advised Nelson in April 1988 that he was meeting with an EEOC investigator about Barletta's case. *Id.* at 21a. That evidence is no more "self-serving" than Nelson's "repeated denials" that such conversations occurred.

respondent filed his own EEOC charge. On June 10, 1988, Nelson demoted respondent. Based on its review of those facts (Pet. App. 12a), the court correctly concluded "that a reasonable jury" could find in respondent's favor. Similarly, the court of appeals concluded that there was ample evidence to support the jury's disbelief that respondent was demoted for reasons other than retaliation. *Id.* at 12a-13a. The court's decision was thus entirely consistent with this Court's decision in *Hicks*. See *Hicks*, 509 U.S. at 511 ("rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination").[5]

2. Petitioner also contests (Pet. 20) the jury's finding of willfulness because "[t]here was no * * * proof" that "Nelson knew or had reckless disregard for the fact that his demotion of [respondent] would violate ADEA," as required by the Court's decision in *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 615 (1993). That factbound contention does not warrant further review by this Court. Moreover, the court of appeals correctly concluded that, based on Nelson's testimony, "because Nelson knew that it was illegal for him to demote [respondent] in retaliation for [his] participation in EEOC proceedings, the jury was

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[5] Petitioner argues (Pet. 13) that the court of appeals transformed this case into a "mixed-motives" case under *Price Waterhouse*, *supra*, by stating that a plaintiff must prove that retaliatory intent was at least one of the motivating factors behind the employment decision. See Pet. App. 12a. The court of appeals' statement, however, is equally true whether the case is governed by *Price Waterhouse* or by *Hicks*. Here, the court of appeals concluded that respondent satisfied his burden of proving discrimination and that holding did not shift to petitioner any burden of proof.

entitled to find that Nelson's retaliatory conduct was willful." Pet. App. 14a.

Petitioner further suggests (Pet. 21) that the fact "[t]hat Nelson waited, upon advice of counsel, to demote [respondent] until the EEOC completed its investigation of his charge should be sufficient to establish his good faith reliance upon counsel's advice" under the Court's decision in *Thurston*, *supra*. As the court of appeals correctly explained, however, "the mere fact that Nelson may have consulted with [petitioner's] legal department does not demonstrate that he acted in good faith in demoting [respondent]." Pet. App. 15a. In contrast to the Court's decision in *Thurston*, 469 U.S. at 129, in which the Court reversed an award of liquidated damages because the employer had "acted reasonably and in good faith" in relying on the opinion of counsel that the challenged plan was lawful, petitioner here presented no evidence that Nelson was advised by counsel that respondent "legally could be demoted," or that Nelson "in good faith relied on any such advice in taking action against [respondent]." Pet. App. 15a. Thus, the court of appeals properly upheld the award of liquidated damages based on the jury's finding of willfulness.

3. Petitioner also argues (Pet. 22) that the court of appeals' decision "reliev[ed] [respondent] of his obligation to mitigate his damages." That factbound contention does not warrant this Court's review. In any event, petitioner's arguments are without merit.

a. The decision below recognized that a victim of employment discrimination has a duty to "use *reasonable diligence* in finding other *suitable* employment." Pet. App. 17a. Based on the evidence in this case, the court of appeals correctly concluded that the district

court did not abuse its discretion in concluding that respondent engaged in reasonable mitigation efforts despite his failure to affirmatively seek a position comparable to the one from which he was demoted. The court of appeals relied on the facts that petitioner proffered no evidence that other suitable work existed; that respondent testified to "his unique and narrow work qualifications" and the lack of "comparable positions in other industries"; and that respondent acted reasonably in assuming the position of train dispatcher. *Id.* at 17a, 18a. Under those circumstances, the court of appeals properly concluded that respondent "acted reasonably in mitigating his damages." *Id.* at 18a.[6]

b. Petitioner also challenges the duration of the award of front pay "to a relatively young plaintiff who failed to mitigate his damages." Pet. 23. As noted

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[6] Contrary to petitioner's contention (Pet. 22-23) the decision below does not conflict with the Third Circuit's decision in *Tubari, Inc.* v. *NLRB*, 959 F.2d 451 (1992). *Tubari* involved the appropriateness of back pay following an employer's violation of the National Labor Relations Act, 29 U.S.C. 158(a)(1)-(3). The Third Circuit held that the employees did not reasonably mitigate their damages when they accepted 66% of their former salary as "wages" for picketing "without undertaking any search for alternative employment, either in the same line of work or elsewhere." 959 F.2d at 459. *Tubari* applied the same legal standard as employed by the decision below. *Id.* at 454 (employer must "demonstrate[] that an employee did not exercise reasonable diligence in his or her efforts to secure employment" to establish that the employee did not reasonably mitigate damages). Moreover, unlike the facts present in *Tubari*, the decision below found that respondent reasonably accepted employment as a train dispatcher in light of his unique skills and the unavailability of other comparable employment. Pet. App. 17a; see also *id.* at 34a n.4.

above, however, the court of appeals properly concluded that respondent reasonably mitigated his damages. Moreover, the court of appeals correctly concluded that because respondent had "no reasonable prospect of obtaining comparable alternative employment," the award of front pay was "necessary to make [respondent] whole after his demotion" based on "the unique circumstances of this case." Pet. App. 19a, 20a. No further review of that factual finding is warranted.

Petitioner also is incorrect in arguing (Pet. 22-23) that the decision below conflicts with the decisions of other courts that have awarded front pay of shorter duration. Those decisions involved facts significantly different from those here. See *Weaver* v. *Casa Gallardo, Inc.*, 922 F.2d 1515, 1529 (11th Cir. 1991) (reversing front pay award because district court failed to "state any reason why * * * [claimant] should not have been able to work his way up from management trainee to a supervisory position" during period of front pay); *EEOC* v. *Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 927 (S.D.N.Y. 1976) (noting that the "economic climate in the pharmaceutical advertising industry" suggested that plaintiff could secure comparable employment within a year).[7]

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[7] The Eighth Circuit in *United Paperworkers Int'l Union* v. *Champion Int'l Corp.*, 81 F.3d 798, 805 (1996), expressed "grave doubt" that an award of 24 years of front pay could be upheld on remand in a case involving a violation of the National Labor Relations Act, 29 U.S.C. 158(a)(5), because the employee's "relatively young age should improve his future opportunities to mitigate through other employment." That dictum does not conflict with the decision below, however, because respondent had "no reasonable prospect of obtaining comparable alternative employment." Pet. App. 19a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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